AMERICAN BANKRUPTCY INSTITUTE

2021 Winter Leadership Conference

Restructuring and Plan-Support Agreements and Other Trends in Out-of-Court Restructurings

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AMERICAN BANKRUPTCY INSTITUTE

ABI Winter Leadership Conference 2021

Restructuring and Plan Support Agreements and Other Trends in Out-of-Court Restructurings

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Meet Our Presenting Team

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General Overview of Restructuring and Plan Support Agreements

Structure

- Contract between a distressed company and certain constituents
- Can include entire classes of creditors or just a few key constituents
- Typically includes a term sheet describing the contemplated restructuring
- Milestones
  - Can include milestones for both out-of-court events (e.g., dates for debt exchanges, votes, and solicitation) and in-court events (e.g., filing a petition, filing a plan, obtaining plan confirmation)
- Agreement to support the plan
- Lock-ups
- Fiduciary outs

General Overview of Restructuring and Plan Support Agreements

Utility

- Similar to pros and cons (to be discussed in more detail later)
- Build consensus on a plan of reorganization
- Build momentum in a bankruptcy case
- Cost savings and efficiency
- Provide a measure of certainty to an uncertain situation and process
- Can be used by sophisticated creditors to increase their leverage

General Overview of Restructuring and Plan Support Agreements

Contrasts for Different Creditor Groups

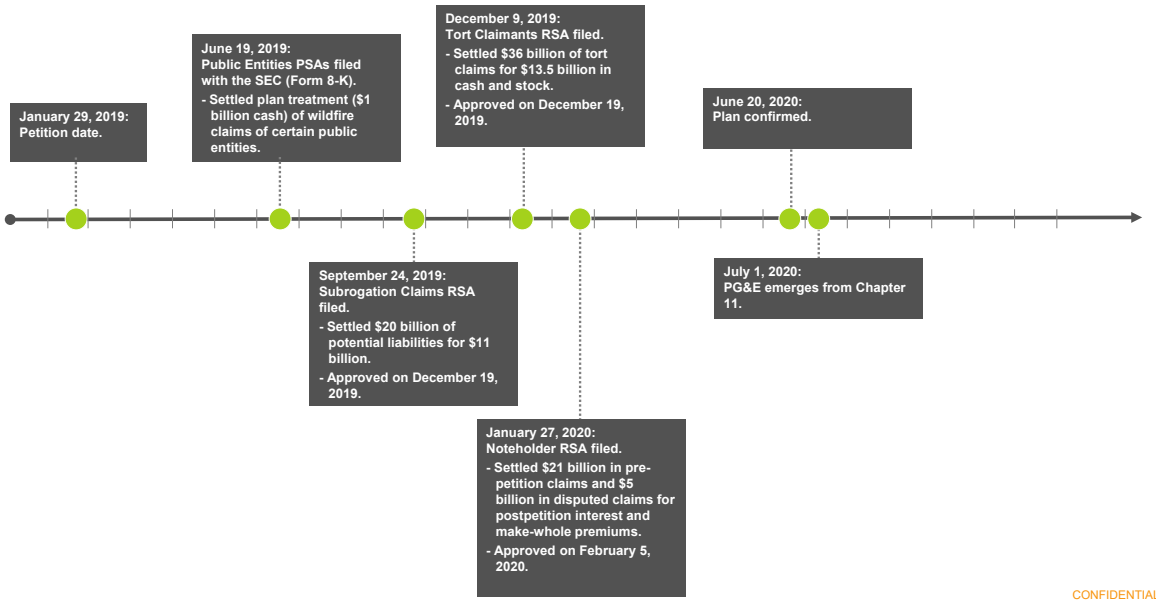
- Most signatories to RSAs are large financial creditors
- Impractical to negotiate pre-petition RSAs with trade creditors
- Largest creditors have the most leverage (as in regular plan negotiations)

General Overview of Restructuring and Plan Support Agreements

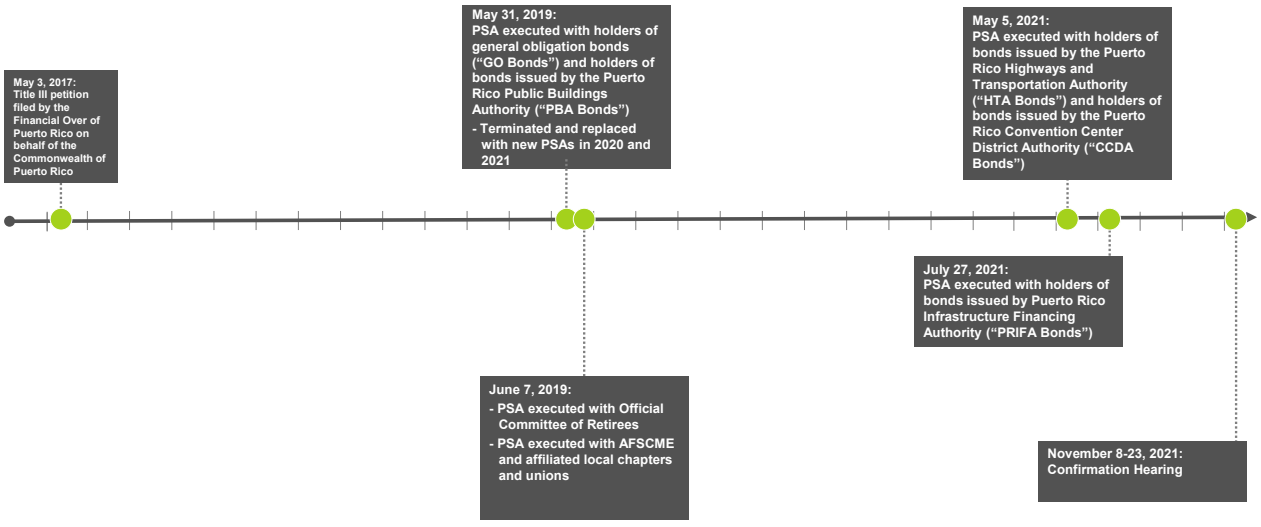
Historical Perspective

- Chandler Act (1938)
- Intended to address the problems with preconceived restructuring plans negotiated between management and key lenders
- Use of independent trustee in all large corporate cases
- Similarities and differences of Chandler-era practices with the RSAs (and bankruptcy process in general) of today

PG&E: RSA / PSA Timeline



Commonwealth of Puerto Rico: PSA Timeline



Pros and Cons of Restructuring and Plan Support Agreements

Pros

- Help build consensus on a plan of reorganization
- Help build momentum in a bankruptcy case
  - It is generally in no one's interest for a case to stagnate
- Provide cost savings and efficiency
- Provide a measure of certainty to an uncertain situation/process by establishing a framework for a plan early in the case (or before)

Pros and Cons of Restructuring and Plan Support Agreements

Cons

- RSA negotiation participants tend to be large financial creditors; RSAs take sophisticated, well-funded constituents and place them in an even better position
- RSAs may short-circuit the intended interaction among constituents in a chapter 11 proceeding
- Some creditors may lose leverage if a substantial percentage of the other parties-in-interest are locked up by RSAs (e.g., trade creditors vs. bondholders)
- Limit the options of both debtors and creditors and lead to issues regarding fiduciary duties
- May constitute impermissible solicitation (more on this later)

Criticisms of Restructuring and Plan Support Agreements

Disenfranchisement

- Most criticisms relate to concerns over disenfranchisement
- Are these criticisms valid?
- Do committees adequately represent those who are not typically involved in negotiations?
- Are creditors and other parties-in-interest any more likely to be disenfranchised in RSA negotiations than in “regular” plan negotiations?

Criticisms of Restructuring and Plan Support Agreements

Solicitation

- Do RSAs constitute impermissible solicitation?
- What is the rationale for not permitting post petition solicitation? Is the rationale valid? Does the same rationale apply to RSAs?
- Pre-petition vs. post-petition RSAs:
  - Courts often view pre-petition RSAs and post-petition RSAs differently. Should they be treated differently?
  - Where should the line be drawn between a permissible plan negotiation and impermissible solicitation?

Criticisms of Restructuring and Plan Support Agreements

Solicitation

- *In re Indianapolis Downs, LLC*, 486 B.R. 286 (Bankr. D. Del. 2013) (Shannon, J.) (denying a motion to designate the votes of parties to a post-petition RSA).
- "[T]he interests that § 1125 and the disclosure requirements are intended to protect are not at material risk in this case. The Code's robust disclosure requirements were designed to end the 'undesirable practice ... of soliciting acceptance or rejection at a time when creditors and stockholders were too ill-informed to act capably in their own interests.' *In re Clamp-All Corp.*, 233 B.R. 198, 208 (Bankr. D. Mass. 1999). The Restructuring Support Parties, by contrast, are all sophisticated financial players and have been represented by able and experienced professionals throughout these proceedings. It would grossly elevate form over substance to contend that § 1125(b) requires designation of their votes because they should have been afforded the chance to review a court-approved disclosure statement prior to making or supporting a deal with the Debtor.
- "In summary, the Court observes that the filing of a Chapter 11 petition is an invitation to negotiate."

Similarities and Differences with Other Bankruptcy-Related topics

- Out-of-court workouts
- DIP financing agreements
  - Ability to exert control over the debtor
  - *Sub rosa* plan issues
- Pre-petition waivers
- Subordination agreements

Fiduciary Outs

- Notwithstanding anything to the contrary herein, nothing in this Agreement shall require a Company Entity or the board of directors, board of managers, or similar governing body of a Company Party, after consulting with counsel, to take any action or to refrain from taking any action with respect to the Restructuring to the extent taking or failing to take such action would be inconsistent with applicable law or its fiduciary obligations under applicable Law.

Fiduciary Outs

- Should the debtor and/or creditors be permitted to exit RSAs due to a material change or better offer?
- Would this invite too much litigation into a process that should improve efficiency?
- Does a higher and better offer need to be one that is solicited or any deal that falls into your lap?
- How can the benefits of fiduciary outs be balanced with efficiency concerns in the bankruptcy process?
- Issues regarding enforcement and enforceability

Assumption of Restructuring and Plan Support Agreements

- Under 11 U.S.C. § 365, a debtor may assume or reject executory contracts and unexpired leases.
- Prof. Vernon Countryman's definition: an executory contract "generally includes contracts on which performance remains due to some extent on both sides."
- Most courts apply a "business judgment" standard for the decision to assume or reject an executory contract.
- Is an RSA an executory contract?
- Is assumption of an RSA warranted or necessary?
- Does it matter (practically) if the debtor does not assume an RSA?

Use of RSAs to Address Financial vs. Operational Issues

- Use of RSAs for financial creditors vs. trade creditors
- RSAs vs. composition agreements
- Practical considerations of pre-petition RSAs and post-petition RSAs with financial creditors vs. trade creditors
- Plan process remains robust mechanism for addressing claims in the same class or different classes held by diffuse holders

Other Trends in Out-of-Court Restructurings

Is "Out-of-Court" Always Out of Court?

- Prepacks appear to be on the rise.
- "For purposes of these guidelines, a 'Prepackaged Chapter 11 case' is one in which the Debtor, substantially contemporaneously with the filing of its chapter 11 petition, files a Confirmation Hearing Scheduling Motion For Prepackaged Plan . . . , plan, disclosure statement (or other solicitation document), and voting certification."
  - Procedural Guidelines for Prepackaged Chapter 11 Cases in the United States Bankruptcy Court for the Southern District of New York

Other Trends in Out-of-Court Restructurings

Is "Out-of-Court" Always Out of Court?

- What we think of as an "out-of-court" restructuring may be changing. While debtors and creditors may have wanted to keep the process entirely out of court in the past in order to keep the restructuring private, they increasingly seek court approval of their out-of-court arrangements so that they can be "blessed" by the bankruptcy court.
- Court approval reduces potential for future litigation.
- An "out-of-court" restructuring may no longer mean that there will not be an eventual chapter 11 process, even if that is a quick prepackaged case.

Questions?

Faculty

Scott F. Gautier is a partner with Faegre Drinker Biddle & Reath LLP in Los Angeles, where he represents corporate clients in financial distress, with the goal of creating and structuring transactions that maximize value for clients. He counsels corporate owners, boards, fiduciaries and creditors on all facets of corporate insolvency and handles corporate chapter 11 cases from every vantage point — as counsel to debtors, ad-hoc and official committees, secured creditors and other constituents. He also works on out-of-court financial restructuring matters, distressed mergers and acquisitions, and advises corporate clients on debtor-creditor issues in nonbankruptcy matters. Mr. Gautier has represented all constituents in corporate restructuring, with particular experience advising corporate owners, boards and fiduciaries on identifying the best strategic alternatives when faced with financial distress, and serving as lead committee counsel and advising on strategic alternatives in corporate chapter 11 cases. Before joining Faegre Drinker, he chaired a corporate restructuring and bankruptcy group at a national law firm. Mr. Gautier is a former director of ABI and the Southern California Turnaround Managers Association. He regularly writes and speaks on financial restructuring and insolvency issues for local and national conferences. Mr. Gautier received his B.S.B.A. from Ohio State University and his J.D. with highest honors from the Chicago-Kent College of Law, where he was elected to the Order of the Coif.

Felicia Gerber Perlman is a partner in the Chicago office of McDermott Will & Emery, where she focuses her practice on complex business reorganizations, debt restructurings and insolvency matters. She also is the global co-head of the firm's Restructuring and Insolvency Practice Group. Ms. Perlman advises debtors, creditors, lenders, investors, sellers, purchasers and other parties-in-interest in all stages of restructuring transactions, from chapter 11 reorganizations to out-of-court negotiations, workouts and acquisitions. She frequently presents on bankruptcy topics and is featured in several notable publications. Ms. Perlman is a frequent speaker and has been recognized in *Turnarounds & Workouts* as one of the nation's "Outstanding Young Bankruptcy Lawyers," and she has repeatedly has been selected for inclusion in *Chambers USA: America's Leading Lawyers* for Business and *The Best Lawyers in America*. In addition, she received the 2017 Flex Success Award from The Diversity & Flexibility Alliance for her commitment and success in creating and working in a flexible environment. She also was named by *Crain's Custom Media* as one of Chicago's Notable Women Lawyers in 2018. Ms. Perlman has been a member of the boards of directors of the Women in Law Empowerment Forum and the Chicago Coalition of Women's Initiatives in Law Firms, and she is a Fellow in the American College of Bankruptcy. She received her B.A. and B.S.E. in 1989 from the University of Pennsylvania's Wharton Business School, and her J.D. in 1992 from Northwestern University Pritzker School of Law.

Melissa M. Root is a partner with Jenner & Block in Chicago and is a member of the firm's Restructuring and Bankruptcy, Bankruptcy Litigation, Energy and ERISA Litigation practices. In addition, she is the co-chair of the firm's Hiring Executive Committee and a member of its Diversity and Inclusion Committee. Ms. Root's experience representing creditors, committees, debtors, examiners and trustees in complex financial restructuring matters and high-stakes bankruptcy litigation. She currently serves as counsel to USA Gymnastics in its chapter 11 case, and a significant part of her practice includes representing committees of retired employees. She currently represents the official

committee of government retirees in the Commonwealth of Puerto Rico's Title III case, and she previously represented retiree committees in the Budd Co., American Airlines and Walter Energy cases. Ms. Root also frequently represents parties in bankruptcy-related appellate matters. She served as counsel for the prevailing petitioners before the U.S. Supreme Court in *Wellness International Network, Limited v. Sharif*, and also served as counsel for the American Bar Association in connection with its *amicus curiae* brief in *Executive Benefits Insurance Agency v. Arkinson*, and as counsel for the National Association of Bankruptcy Trustees in connection with its *amicus curiae* brief filed in the U.S. Supreme Court in *Baker Botts L.L.P.* and *Jordan, Hyden, Womble, Culbreth & Hozer, P.C. v. Asarco LLC*. Ms. Root devotes significant time to *pro bono* work and currently represents a class of former students in the ITT Technical Institute bankruptcy case. She is active in ABI, for which she serves on the advisory committee for several conferences, and she was honored as one of ABI's "40 Under 40" in its 2017 inaugural class. Ms. Root received her B.A. *magna cum laude* in 2000 from Bowling Green State University and her J.D. *cum laude* in 2003 from the University of Michigan Law School.

Brian I. Swett is a partner with McGuireWoods LLP in New York and concentrates his practice on restructuring and insolvency, including representing a broad range of parties in complex restructuring, bankruptcy and workout matters. He represents senior secured lenders and other creditors, companies (including debtors in possession), shareholders, investors, sellers and purchasers in restructurings, both in and out of court. These representations have involved federal district and bankruptcy court proceedings and appeals across the country. Mr. Swett's experience includes a range of debtor-in-possession bankruptcy financing and cash-collateral matters in a wide range of industries. He has structured facilities that provide liquidity and accommodate a broad array of pre-bankruptcy capital structures. Mr. Swett recently was involved on behalf of credit-enhancers, construction agents, lenders and debtor-in-possession financing agents and lenders in a wide range of matters in the hospital, senior living, continuing care retirement community and long-term care industries. In particular, his representations include a number of international, diversified financial institution in bankruptcy cases and out-of-court workout and restructuring matters involving loans to (or letters of credit enhancing bonds issues with respect to) hospitals, continuing care retirement communities, assisted-living facilities and nursing homes in Illinois, New York, California, Florida, Maryland, Louisiana, Texas, Wisconsin, Georgia, Tennessee, Mississippi, Arizona, Kansas and Utah. He has also represented parties in interest in transactions under the remedial provisions of the Uniform Commercial Code, including private sales, public sales and acceptances of collateral in exchange for the full or partial satisfaction of debt. In addition, he has overseen the acquisition of distressed assets. Mr. Swett received his B.A. Phi Beta Kappa in 1992 in international relations from Johns Hopkins University, his M.A. in international relations in 1993 from Johns Hopkins University School of Advanced International Studies, and his J.D. in 1996 from New York University School of Law.

Paul H. Zumbro is a partner in Cravath, Swaine & Moore LLP's Corporate Department in New York and heads the firm's Financial Restructuring & Reorganization practice. His practice focuses on restructuring transactions and related financings, both in and out of court, as well as on bankruptcy M&A transactions. Mr. Zumbro's restructuring experience includes advising the firm's corporate and financial institution clients on bankruptcy issues, and advising on debtor/creditor rights in a variety of contexts. His restructuring experience includes both debtor- and creditor-side representations, and also includes work in the fields of municipal and sovereign debt-restructuring, as well as insolvency-related litigation matters. His recent matters include representing PG&E in connection

with its $5.5 billion DIP financing, its $40+ billion debt and equity exit financing and other advisory matters relating to PG&E's reorganization proceedings under chapter 11, and The Weinstein Company in connection with its voluntary chapter 11 petition. Mr. Zumbro is a member of ABI, the International Bar Association (IBA) and the IBA's Banking Law and Insolvency, Restructuring and Creditors' Rights Committees, and he was elected to serve on the Thomson Reuters *Practical Law* Bankruptcy Advisory Board. He has been named a "Bankruptcy MVP" by *Law360* and has been listed in *The Best Lawyers in America*, *The Legal 500 US* and *IFLR1000* for his skill in bankruptcy and corporate restructuring. He also has been named by *Lawdragon* as one of "500 Leading Global Restructuring & Insolvency Lawyers," "500 Leading U.S. Bankruptcy & Restructuring Lawyers" and "500 Leading Lawyers in America." Mr. Zumbro received his B.A. *cum laude* and with distinction from Yale College in 1992 and his J.D. from Columbia Law School in 1997, where he was a Stone Scholar.